

1 ROBERT S. GERBER, Cal. Bar No. 137961  
rgerber@sheppardmullin.com  
2 BRAM HANONO, Cal. Bar No. 259777  
bhanono@sheppardmullin.com  
3 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP  
A Limited Liability Partnership  
4 Including Professional Corporations  
12275 El Camino Real, Suite 200  
5 San Diego, California 92130-2006  
Telephone: 858-720-8900  
6 Facsimile: 858-509-3691

7 Attorneys for Defendants  
KEVIN TEMPLE and THE ENTERPRISE SELLING  
8 GROUP, LLC

9  
10 UNITED STATES DISTRICT COURT  
11 SOUTHERN DISTRICT OF CALIFORNIA

12 VALUESELLING ASSOCIATES, LLC, a  
California limited liability company; SALES  
13 VISION, LLC, a California limited liability  
company,

14 Plaintiffs - Respondents,

15 v.

16 KEVIN TEMPLE, an individual doing  
17 business as THE ENTERPRISE SELLING  
GROUP; and THE ENTERPRISE SELLING  
18 GROUP, LLC,

19 Defendants - Cross-Petitioners.

Case No. 09-CV-01493-JM-MDD

**DEFENDANTS/CROSS-PETITIONERS'  
OPPOSITION TO PLAINTIFF/  
RESPONDENT VALUESELLING  
ASSOCIATES, LLC'S MOTION TO  
VACATE, MODIFY, OR CORRECT  
ARBITRATION AWARD AND BRIEF  
IN SUPPORT OF THEIR PETITION TO  
CONFIRM AWARD**

Judge: Hon. Jeffrey T. Miller  
Dept.: 16  
Date: May 23, 2011  
Time: 10:00 a.m.

U.S. Magistrate Judge: Mitchell D. Dembin

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1 Defendants and Cross-Petitioners Kevin Temple and The Enterprise Selling  
 2 Group, LLC (collectively "Defendants") hereby oppose Plaintiff and Respondent Value  
 3 Selling Associates, LLC's ("VSA") Motion to Vacate, Modify, or Correct Arbitration Award  
 4 and request that the Court grant Defendants Cross-Petition to Confirm Arbitration Award  
 5 ("Cross-Petition") (Doc. No. 63).<sup>1</sup>

## 6 I. INTRODUCTION

7 Defendants won a fair, lengthy, arbitration on the merits presided over by a  
 8 non-biased arbitrator. VSA is not happy about it, does not want to abide by the Arbitration  
 9 Award, and does not want to pay the fee award associated with it. Nevertheless, to  
 10 encourage the speedy, efficient, and just resolution of disputes outside of the courts, public  
 11 policy and the law mandate that the Court uphold the Arbitrator's Award, and end this  
 12 dispute now because there are no grounds for vacatur, modification, or correction of the  
 13 Arbitration Award.

14 VSA and Defendants are competitors, each offering sales training services.  
 15 Julie Thomas, the sole owner of VSA, purchased the ValueSelling business from Mr. Temple  
 16 and his partner and negotiated a five-year non-compete provision. That five years has long  
 17 expired. Now that Mr. Temple is free to compete with VSA, VSA is on a mission to  
 18 eliminate fair competition from the marketplace. Among other allegations, VSA sued  
 19 Defendants claiming infringement of its copyrighted ValueSelling Program workbook, and  
 20 particularly, specific portions of that workbook including a "Value Prompter" form and a  
 21 "Qualified Prospect Formula" contained in the workbook.

22  
 23 <sup>1</sup> In addition to the arguments set forth herein as to why the Court should deny VSA's Motion  
 24 and grant Defendants' Cross-Petition, VSA's motion should also be denied because VSA's  
 25 motion is defective under the California Arbitration Act and the Federal Arbitration Act,  
 26 and is in violation of Local Rules. First, a petition to vacate an arbitration award must state  
 27 the name of the arbitrator pursuant to Cal. Code Civ. Pro. § 1285.4(b), or under 9 U.S.C. §  
 28 13, it must have attached the agreement of the parties appointing the arbitrator. VSA did  
 not comply with either rule. Second, VSA submitted "sealed" exhibits in support of its  
 motion, but VSA did not seek prior court approval in violation of Rule 79.2(c), which  
 requires a court order to file documents under seal. Finally, VSA failed to electronically file  
 the first seven of its exhibits, in violation of the CM/ECF policies.

1 By applying the "extrinsic/intrinsic" test advocated by VSA, the Arbitrator,  
2 John H. L'Estrange, Jr., Esq., correctly found that Defendants did not infringe VSA's  
3 copyrighted material, and in doing so found that neither the ValuePrompter nor the Qualified  
4 Prospect Formula was protected by copyright. The Arbitrator clearly and thoughtfully  
5 explained his findings in his 26-page Interim Award. Moreover, the Arbitrator decided the  
6 matter after a year of litigation involving voluminous document production, depositions, a  
7 motion for preliminary injunction against Defendants, pre-arbitration briefs, a 10-day  
8 arbitration hearing with 10 witnesses and two experts, and post-arbitration briefs.

9 There are no grounds for vacatur of the Arbitral Award under the California  
10 Arbitration Act ("CAA") or the Federal Arbitration Act ("FAA"), both under which courts  
11 refuse to overturn arbitration awards except in vary narrow circumstances. Because the  
12 parties agreed that California law governed their agreements, the CAA governs this dispute.  
13 Under the CAA, a court can only vacate or correct an award if narrow statutory grounds are  
14 met. Those grounds are not present in this case, and therefore VSA's motion must be denied.

15 Even if this Court chooses to apply the FAA as advocated by VSA, the  
16 outcome will be the same. VSA's reliance on the extremely narrow exceptions recognized in  
17 the Ninth Circuit, which allows for vacatur of an arbitration award if an arbitrator  
18 "manifestly disregards the law" or if his award is "completely irrational," is misplaced and  
19 will fail. First, there is no evidence that the Arbitrator "manifestly disregarded" the law by  
20 acknowledging application of the "extrinsic/intrinsic" copyright test and then ignoring it.  
21 Rather, review of the Arbitrator's Award shows that the Arbitrator actually applied the test.

22 Second, the Arbitrator's finding that neither the ValuePrompter nor the  
23 Qualified Prospect Formula are protected by copyright is not completely irrational. The  
24 Arbitrator decided that issue because it was submitted to the Arbitrator for his review, and  
25 determination of that issue was inherently part of the "extrinsic/intrinsic" test. To modify the  
26 Award and sever the foregoing holding would completely affect the outcome of the  
27 controversy and allow VSA to continue to allege copyright infringement against Defendants.  
28 Therefore, neither vacatur nor modification of the Award is justified on these grounds.

VSA chose to arbitrate its dispute and agreed to abide by the Arbitrator's Award, whether right or wrong. Because there are no grounds to support VSA's Motion, this Court must grant Defendants' Cross-Petition to confirm the arbitration Award and enter judgment thereon in favor of Mr. Temple and The Enterprise Selling Group, LLC ("ESG").

## II. BRIEF FACTUAL BACKGROUND LEADING TO ARBITRATION

On or about July 9, 2003, VSA<sup>2</sup> and its holding company, Sales Vision, LLC ("SVL"), entered into a Purchase Agreement with Mr. Temple and third parties ValueSelling Systems Inc. ("VSSI") (owned by Lloyd Sappington) and Dialogue Management, Inc. for the acquisition of the ValueVision Associates business (now called ValueSelling Associates, or "VSA") ("Purchase Agreement"). (*See* VSA Ex. B-0983.) The purchase included intellectual property owned by VSSI, known as the ValueSelling Program. Importantly, the parties negotiated for a five-year non-competition clause to be part of the Agreement. (*Id.*, pp. 993-94; ¶ 8.8.) There was no doubt at the time of the purchase that the parties knew Mr. Temple would be competing again with VSA within five years.

In conjunction with the Purchase Agreement, on or about July 9, 2003, VSA and Mr. Temple entered into a consultancy agreement whereby Mr. Temple would act as a consultant for VSA with certain licensing rights to the ValueSelling Program then acquired by VSA ("Consultancy Agreement"). (*See* VSA Ex. B-0722.)

The relationship between VSA and Mr. Temple was ongoing until a series of disputes between the parties apexed in 2007 – shortly before Mr. Temple's non-competition clause was set to expire. In December 2007, VSA, SVL, and Mr. Temple entered into a settlement agreement to terminate their business relationship, which included early termination of the non-competition provision in the Purchase Agreement ("Settlement Agreement"). (*See* VSA Ex. B-0339.) Among other things, the parties specifically acknowledged that Mr. Temple would embark on a new business venture for products

<sup>2</sup> The entity which was a party to the Purchase Agreement was "Value Vision Associates, LLC," but subsequent to its purchase, ownership was transferred to ValueSelling Associates, LLC.

(namely, ESG) other than "ValueSelling Products." (*Id.*, p. 341, ¶ 7.)

Pursuant to the Purchase Agreement, Consultancy Agreement, and Settlement Agreement (the "Agreements"), the parties agreed to submit to arbitration any dispute, controversy, or question arising out of the Agreements. (VSA Ex. B-0983, p. 997, ¶ 11.4; VSA Ex. B-0722, p. 727, ¶ 9.4; VSA Ex. B-0339, p. 342, ¶ 12.) Additionally, pursuant to the Agreements, the parties agreed that the Agreements would be governed by California law. (VSA Ex. B-0983, p. 997, ¶ 11.4; VSA Ex. B-0722, p. 727, ¶ 9.2; VSA Ex. B-0339, pp. 341-42, ¶ 11.)

Despite the arbitration provisions in the Agreements,<sup>3</sup> on July 9, 2009, VSA and SVL filed suit against Defendants in this Court alleging eleven causes of action, including violations of the Copyright Act of 1976 (17 U.S.C. §§ 101 *et seq.*) under the Agreements and as to Defendants' alleged improper use and infringement of the ValueSelling Program materials, and in particular, the ValuePrompter and the Qualified Prospect Formula.<sup>4</sup> (Doc. No. 1.) On September 3, 2009, Defendants filed a motion for an order compelling arbitration and dismissing the case, or in the alternative, staying the proceedings. (Doc. No. 4.) On November 5, 2009, this Court, granted Defendants' motion, compelling the parties to arbitrate and dismissing the case.<sup>5</sup> (Doc No. 11.)

On January 5, 2010, pursuant to this Court's order compelling arbitration and the arbitration provisions in the Agreements, VSA filed a demand for arbitration against

<sup>3</sup> Filing an unnecessary lawsuit instead of initiating arbitration, and then fighting the motion to compel arbitration, was the first set of steps VSA took to make this case expensive for Mr. Temple and his company. The length and scope of the proceedings, as described further herein, shows why there was likely no doubt in the Arbitrator's mind why an award of attorneys' fees to Defendants was appropriate in this case.

<sup>4</sup> The "ValuePrompter" is, as the Arbitrator found under copyright law, a "blank form" which constitutes part of the ValueSelling Program materials. VSA alleged ESG's "eNavigator" was nothing more than a "copy" of the ValuePrompter. The "Qualified Prospect Formula" is a formula represented by words and numbers which is also a part of the ValueSelling Program materials. VSA alleged ESG's "Prospect to Customer Formula" was nothing more than a "copy" of VSA's Qualified Prospect Formula.

<sup>5</sup> The case was later reopened on February 10, 2011 in order to permit the Court to determine whether Defendants are entitled to attorneys' fees and costs for prevailing on their motion to compel arbitration. (Doc. No. 18.) That decision is still pending.

1 Defendants under the auspices of the American Arbitration Association. (Gerber Decl., ¶ 2.)  
2 VSA's demand for arbitration included nine causes of action, including copyright  
3 infringement. (*Id.*) "In accordance with the California Arbitration Law (CCP § 1281.85 et  
4 seq.)," on February 4, 2010, the parties, through the American Arbitration Association and  
5 by mutual agreement, appointed Mr. L'Estrange as Arbitrator in this matter. (*Id.*; *see also* Ex.  
6 D to Cross-Petition (Doc. No. 63).)

### 7 **III. PROCEDURAL HISTORY OF THE ARBITRATION PROCEEDINGS**

8 The arbitration proceedings lasted approximately one year, including document  
9 productions, depositions, a motion for preliminary injunction, pre-hearing briefing, a 10-day  
10 hearing, and post-hearing briefing. Even though arbitration is supposed to be quick, efficient  
11 and inexpensive, the arbitration proceeding in this case was long, drawn-out and expensive.  
12 It resembled a judicial proceeding in many ways, discounting any arguments that VSA was  
13 not afforded justice or that its claims did not receive appropriate consideration by the  
14 Arbitrator.

15 Shortly after the arbitration proceedings commenced in January, 2010, both  
16 parties propounded lengthy document requests resulting in the production of thousands of  
17 pages of documents between the parties. (Gerber Decl., ¶ 3.) The parties then engaged in a  
18 long meet and confer process which resulted in the production of even more documents from  
19 both parties. (*Id.*) In total, Defendants produced over 4,400 pages of documents.  
20 Defendants' production included the electronic production of thousands of pages of  
21 documents, which included electronically stored information requested by VSA, as well as  
22 thousands of pages of hard copies of additional documents. VSA produced over 10,600  
23 pages of documents to Defendants. (*Id.*)

24 On March 15, 2010, VSA filed a motion for preliminary injunction, based on  
25 its copyright claim, breach of contract claims, and trademark infringement claim (which was  
26 eventually abandoned prior to the arbitration hearing). (Gerber Decl., ¶ 4.) VSA's motion  
27 was 56 pages long, not including the 25 exhibits and two supporting declarations, which  
28

1 stood approximately six inches tall.<sup>6</sup> (*Id.*) Defendants opposed the motion with a 47-page  
2 brief, which was accompanied by 18 exhibits as well as a supporting declaration. (*Id.*) VSA  
3 also submitted a nine-page reply brief, along with 12 more exhibits and three declarations for  
4 the Arbitrator's consideration. (*Id.*)

5 On May 14, 2010, the parties presented oral arguments to the Arbitrator  
6 regarding VSA's motion for preliminary injunction, which lasted approximately two hours.  
7 (Gerber Decl., ¶ 5.) After 10 more days of deliberation, on May 24, 2010, the Arbitrator  
8 issued his 19-page Order Re: [VSA]'s Motion for Preliminary Injunction, denying VSA's  
9 motion in its entirety. (*Id.*; VSA Ex. A-0001.)

10 Claiming that the Arbitrator and Defendants "misunderstood" VSA's claims,  
11 VSA petitioned the Arbitrator to file a "specification of claims." (Gerber Decl., ¶ 6.) The  
12 reason VSA had to petition the Arbitrator to do so is because VSA missed the deadline  
13 previously set by the Arbitrator to file a specification of claims (filing a specification of  
14 claims was a requirement pursuant to the Arbitrator's Preliminary Hearing and Scheduling  
15 Order, which VSA ignored). (*Id.*) Defendants did not oppose VSA's petition. Therefore, it  
16 was granted, and on June 7, 2010, VSA filed its specification of claims.<sup>7</sup> (VSA Ex. A-0036.)

17 Discovery continued (after the parties attempted to mediate) in September  
18 2010. (Gerber Decl., ¶ 7.) Additional documents were produced by the parties, and the  
19 parties engaged in approximately four full days of depositions. (*Id.*) VSA took the  
20 deposition of Kevin Temple on September 27, 28 and 30, 2010. Defendants took the  
21 deposition of Julie Thomas on September 30 and October 1, 2010. (*Id.*)

22 Prior to the arbitration hearing, the parties submitted pre-hearing briefs. On

---

23  
24 <sup>6</sup> One of VSA's exhibits, which VSA relied upon to argue that it would prevail in its  
25 copyright infringement claim, was Mr. Sappington's 1990 compilation copyright of a  
26 ValueSelling Program workbook. In its motion, VSA made the argument that Defendants  
copied the ValuePrompter and the Qualified Prospect Formula in that workbook. (Gerber  
Decl., ¶ 4.)

27 <sup>7</sup> In its specification of claims, just as it had argued in its preliminary injunction motion, VSA  
28 claimed that Defendants infringed three of its copyrights, including Mr. Sappington's 1990  
copyright. (VSA Ex. A-0036, p. 43.)

1 October 27, 2010, VSA filed and served its 26-page pre-hearing brief. (Gerber Decl., ¶ 8;  
 2 VSA Ex. A-0046.)<sup>8</sup> On November 4, 2010, Defendants served and filed their 29-page pre-  
 3 hearing brief. (Gerber Decl., ¶ 8; VSA Ex. A-0082.) By the time the arbitration hearing  
 4 began, the Arbitrator clearly had a very good understanding of the issues, having read and  
 5 analyzed over one hundred pages of briefing and the key evidentiary exhibits to be offered  
 6 by the parties, including their primary business agreements and examples of the  
 7 ValuePrompter and Qualified Prospect Formula as set forth in various workbooks together  
 8 with Defendants' alleged infringing examples. (*Id.*)

9 The arbitration hearing began on November 9, 2010. (Gerber Decl., ¶ 9.) The  
 10 hearing proceeded over 10 business days, concluding on November 23, 2010. During the  
 11 10-day hearing, the Arbitrator presided over opening oral statements by both parties, as well  
 12 as testimony (live, and by declaration) of 10 percipient witnesses and two expert witnesses.  
 13 (*Id.*) In addition, VSA submitted 143 exhibits and Defendants submitted 441 exhibits to the  
 14 Arbitrator for his consideration (not all were referred to by counsel). (*Id.*)

15 After the arbitration hearing ended, the Arbitrator suggested to both counsel  
 16 that he preferred to take closing briefs in lieu of an oral argument. (Gerber Decl., ¶ 10.)  
 17 Neither side objected or demanded an opportunity for oral argument. (*Id.*) On December 10,  
 18 2010, the parties therefore submitted comprehensive post-hearing briefs for the Arbitrator's  
 19 consideration. (*Id.*) Both parties' briefs were 25 pages in length, setting forth once again  
 20 each parties' claims and defenses.<sup>9</sup> (*Id.*; VSA Exs. A-0120 and A-1050.)

21 On January 6, 2011, the Arbitrator issued a 26-page, well-articulated, legally  
 22 supported, and well-reasoned Interim Award, finding in favor of Defendants regarding  
 23 VSA's copyright infringement claim (as well as finding for and against VSA and Defendants  
 24 regarding various other claims and cross-claims), and declaring Defendants the overall

25 <sup>8</sup> In its brief, VSA once again argued that Defendants infringed its copyrights by copying the  
 26 ValuePrompter. (VSA Ex. A-0046, p. 62-64.)

27 <sup>9</sup> In its post-hearing brief, VSA specifically alleged that Defendants copied VSA's  
 28 ValuePrompter and Qualified Prospect Formula, which was the same allegation argued by  
 VSA during the hearing. (Gerber Decl., ¶ 9; VSA Ex. A-0120, pp. 128, 132-33.)

1 prevailing parties entitled to an award of attorneys' fees and costs. (Gerber Decl., ¶ 11.; VSA  
 2 Ex. A-0225.) The Interim Award disposed of all claims and counterclaims in the arbitration,  
 3 leaving open only the issue regarding the amount of Defendants' fee award. (*Id.*) In spite of  
 4 the lengthy and detailed Interim Award, which specifically disposed of VSA's copyright  
 5 claim, VSA brought a motion for reconsideration and lost.<sup>10</sup> (Gerber Decl., ¶ 11; VSA Ex.  
 6 A-0333.) The parties submitted briefs regarding attorneys' fees, and on March 16, 2011, the  
 7 Arbitrator issued his Final Award, confirming the Interim Award and awarding Defendants  
 8 \$262,135.02 in attorneys' fees and costs. (Gerber Decl., ¶ 11; VSA Ex. A-0336.)

9           On April 11, 2011, VSA filed the instant motion, arguing once again that the  
 10 Arbitrator and Defendants misunderstand VSA's claims, and therefore, this Court should  
 11 vacate, modify, or correct the Arbitrator's Final Award. (Doc. Nos. 24-59.)<sup>11</sup> On April 13,  
 12 2011, Defendants filed a Cross-Petition to Confirm the Arbitration Award because there are  
 13 no grounds to vacate, modify, or correct the Arbitration Award and because they seek an  
 14 affirmative order of this Court by way of this motion affirming the Award and granting them  
 15 additional fees and costs associated with this motion. (Doc No. 63.) Defendants hereby  
 16 incorporate their Cross-Petition by reference.

17           On April 25, 2011, Defendants filed a Motion to Strike the unofficial hearing  
 18 transcript submitted by VSA in support of its Motion to Vacate, Modify, or Correct the  
 19 Arbitration Award. (Doc. No. 66.) Defendants hereby incorporate their arguments presented  
 20 in the motion to strike as to why it is wholly improper for the Court to consider the unofficial  
 21 transcript in deciding this matter.

22           **IV. FOR STRONG PUBLIC POLICY REASONS, COURTS SHOULD ALMOST**  
 23           **NEVER VACATE, CORRECT, OR MODIFY AN ARBITRATION AWARD**

24           Courts, California and federal alike, are extremely adverse to overturning

25 <sup>10</sup> As here, the Arbitrator found that VSA's motion to, among other things, modify the Interim  
 26 Award, sought "major substantive modifications to the Interim Award." (VSA Ex. A-0333,  
 p. 335.)

27 <sup>11</sup> On April 12, 2011, the Court issued a discrepancy order requiring VSA to re-file its motion.  
 28 (Doc. No. 60.) VSA re-filed its motion on April 14, 2011. (Doc. No. 64.)

1 arbitration awards. There is strong public policy which dictates that arbitration awards  
 2 should be upheld except in very narrow circumstances. The purpose of arbitration is to  
 3 afford parties quick, inexpensive, and **conclusive** resolution of their disputes. Because  
 4 parties contract to allow an arbitrator to adjudicate their disputes, parties are bound by an  
 5 arbitrator's decision, **right or wrong**. They knowingly give up a right to a jury trial, and  
 6 they knowingly give up a right to judicial review for errors of fact and law. This policy is  
 7 clear in California, and under the CAA, which governs this dispute, VSA has presented no  
 8 grounds for vacatur or modification of the Arbitration Award.

9           Instead, VSA argues this dispute is governed by the FAA, rather than the CAA.  
 10 VSA clings to very narrow exceptions recognized in the Ninth Circuit, which allows for  
 11 vacatur of an arbitration award if an arbitrator "manifestly disregards the law" or if his or her  
 12 award is "completely irrational." The problem for VSA is that even if the FAA applies, the  
 13 Award in this case is neither a product of a "manifest disregard of the law" or "complete  
 14 irrationality," and these exceptions are extremely narrow and rarely granted. Moreover, they  
 15 do not allow a court to review and weigh evidence *de novo* or reconsider the legal merits of  
 16 the controversy as VSA requests this Court to do. Whether this Court decides this motion  
 17 under the CAA or the FAA, the conclusion will be the same: VSA's motion must be denied  
 18 and the Arbitral Award must be confirmed.

19 **A. VSA's Motion Is Governed by the CAA.**

20           The instant motion should be decided pursuant to the CAA (Cal. Civ. Pro.  
 21 § 1280 *et seq.*), not the FAA (9 U.S.C. § 1 *et seq.*). The Supreme Court has made clear that  
 22 the FAA rules governing arbitration do not apply where the parties have provided otherwise.  
 23 In *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior*  
 24 *University*, 489 U.S. 468, 472-76 (1988) the Supreme Court held that the CAA applied  
 25 where the parties agreed the contract would be governed by "'the law of the place where the  
 26 project is located,'" which was California in that case. The Supreme Court explained that  
 27 nothing in the FAA prevents enforcement of agreements to arbitrate under different rules.  
 28 *Id.* at 476. Indeed, the Court explained that the purpose of the FAA is to enforce arbitration

1 agreements into which parties had entered. Therefore, if parties choose to arbitrate under  
 2 California law, then the CAA applies. *Id.* at 478; *see also Ovitz v. Schulman*, 133  
 3 Cal.App.4th 380, 848-55 (2005) (the FAA does not preempt California's statutory grounds  
 4 for vacating arbitration award).

5 Here, the parties agreed the Agreements and the resolutions of their disputes  
 6 would be governed by California law. (VSA Ex. B-0983, p. 997, ¶ 11.4; VSA Ex. B-0722,  
 7 p. 727, ¶ 9.2; VSA Ex. B-0339, pp. 341-42, ¶ 11.) The parties also appointed the Arbitrator  
 8 pursuant to the CAA, not the FAA. (Gerber Decl., ¶ 2; Ex. D to Cross-Petition (Doc. No.  
 9 63).) Therefore, the issue of whether or not this Court confirms the Arbitration Award is to  
 10 be governed by the CAA, as agreed to by the parties.<sup>12</sup>

11 **B. The CAA Strongly Favors Confirmation of Arbitration Awards and Does Not**  
 12 **Allow Vacatur or Correction of Awards for An Arbitrator's Error of Law or**  
 13 **Fact.**

14 California courts strongly favor enforcement of arbitration awards, and  
 15 motions to vacate or correct arbitration awards are rarely granted because "the Legislature  
 16 has expressed a 'strong public policy in favor of arbitration as a speedy and relatively  
 17 inexpensive means of dispute resolution.'" *Moncharsh v. Heily & Blase*, 3 Cal.4th 1, 11  
 18 (1992) (citation omitted).

19 The California Supreme Court has made clear that a court's power to overturn  
 20 an arbitrator's award is confined to narrow statutory grounds. *Moncharsh*, 3 Cal.4th at 11  
 21 ("We conclude that an award reached by an arbitrator pursuant to a contractual agreement to  
 22 arbitrate is not subject to judicial review except on the grounds set forth in sections 1286.2  
 23 (to vacate) and 1286.6 (for correction)"). The Court made clear that the "**merits of the**  
 24 **controversy between the parties are not subject to judicial review. . . courts will not**

25 <sup>12</sup> While Defendants argued in connection with their motion to compel arbitration that this  
 26 original case should be dismissed and ordered to arbitrate pursuant to the FAA, the parties  
 27 later agreed to arbitrate under the CAA by having the Arbitrator appointed "[i]n accordance  
 28 with the California Arbitration Law (CCP Section 1281.85 et seq.)" and conducting an  
 arbitration under the auspices of his jurisdiction with the American Arbitration Association.

1 review the validity of the arbitrator's ruling . . . [and] a court may not review the  
 2 sufficiency of the evidence supporting an arbitrator's award." *Id.* at 11 (emphasis  
 3 added); *see also e.g. Schlessinger v. Rosenfeld, Meyer & Susman*, 40 Cal.App.4th 1096  
 4 (1995) (same); *Marsch v. Williams*, 23 Cal.App.4th 238, 244 (1994) ("even where  
 5 application of a particular body of law is required by the parties' arbitration agreement, an  
 6 arbitrator's failure to apply such law is not in excess of an arbitrator's powers").

7 Consistent with the foregoing, the only statutory grounds on which an  
 8 arbitration award may be vacated under the CAA are found in Section 1286.2(a) of the  
 9 California Code of Civil Procedure, which provides that a court may vacate an award if it  
 10 determines that: (1) it was procured by corruption, fraud or other undue means; (2) the  
 11 arbitrator was corrupt; (3) the arbitrator substantially prejudiced a party by his misconduct;  
 12 (4) "[t]he arbitrators exceeded their powers and the award cannot be corrected without  
 13 affecting the merits of the decision upon the controversy submitted"; (5) the parties' rights  
 14 were prejudiced because the arbitrator refused to postpone the hearing or refused to hear  
 15 evidence; and (6) the arbitrator failed to disclose grounds for disqualification or was  
 16 disqualified.

17 With regard to subsection (4) above, the *Moncharsh* Court stated:

18 It is well settled that 'arbitrators do not exceed their powers  
 19 merely because they assign an erroneous reason for their  
 20 decision.' [citations omitted]. A contrary holding would  
 21 permit the exception to swallow the rule of limited judicial  
 22 review; a litigant could always contend the arbitrator erred and  
 23 thus exceeded his powers. . . . [I]t is within the 'powers' of the  
 24 arbitrator to resolve the entire 'merits' of the 'controversy  
 submitted' by the parties. [citations omitted] Obviously, the  
 'merits' include all the contested issues of law and fact  
 submitted to the arbitrator for decision. The arbitrator's  
 resolution of these issues is what the parties bargained for in  
 the arbitration agreement. *Id.* at 28.

25 The only statutory grounds on which an arbitration award may be corrected  
 26 under the CAA are found in Section 1286.6 of the California Code of Civil Procedure, which  
 27 provides that a court may correct an award if it determines: (a) there is an evident  
 28 miscalculation of figures or an evident mistake in the description or a person or thing in the

award; (b) "[t]he arbitrators exceeded their powers but the award may corrected without affecting the merits of the decision upon the controversy submitted"; or (c) the award is imperfect in its form.

If none of the following statutory grounds for vacatur or correction of an award is met, a court must confirm the arbitration award. Cal. Code Civ. Pro. § 1286. Courts support this strict rule because "by voluntarily submitting to arbitration, the parties have agreed to bear the risk in return for a quick, inexpensive, and conclusive resolution to their dispute." *Moncharsh* at 11. "[A]rbitral finality is a core component of the parties' agreement to submit to arbitration. Thus, an arbitration decision is final and conclusive *because the parties have agreed that it be so.*" *Id.* at 10 (emphasis in original). The second reason courts "tolerate risk of an erroneous decision" is because the risk of arbitral error has been reduced by the statutory provisions allowing courts to vacate or correct for "serious problems with the award itself or with fairness of the arbitral process." *Id.* at 12.

**C. The FAA Also Strongly Favors Confirmation of Arbitration Awards and Only Allows Vacatur, Correction, or Modification of Awards in Very Narrow Circumstances.**

Similar to the policy favoring the finality of arbitration agreements under the CAA, courts applying the FAA also favor enforcement of arbitration awards and rarely grant motions to vacate, modify, or correct an arbitration award. Courts applying the policies of the FAA understand that "[b]road judicial review of arbitration decisions could well jeopardize the very benefits of arbitration, [i.e. speed and informality,] rendering informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process." *Collins v. Horton*, 505 F.3d 874, 879 (9th Cir. 2007) (finding that arbitrator did not manifestly disregard the law in failing to give preclusive effect to prior federal court decision) (citing *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 998 (9th Cir. 2003)). Thus, courts "tread lightly in reviewing arbitration awards" and review is "extremely narrow." *Hoffman v. Cargill Incorp.*, 236 F.3d 485, 461 (8th Cir. 2001) (holding that the district court exceeded its authority in vacating the arbitration award.)

1 Under the FAA, a court's power to overturn an arbitrator's award is confined to  
 2 narrow statutory grounds, similar to the grounds under the CAA. In *Hall Street Associates,*  
 3 *LLC v. Mattel, Inc.*, 552 U.S. 576, 584 (2008), the Supreme Court held that 9 U.S.C §§ 10  
 4 and 11 "respectively provide the FAA's exclusive grounds for expedited vacatur and  
 5 modification." Parties are not allowed to expand the scope of judicial review by contract.  
 6 *Id.* at 578-81. And, "**Neither erroneous conclusions nor unsubstantiated factual findings**  
 7 **justify federal court review of an arbitral award under the [FAA], which is**  
 8 **unambiguous in this regard.**" *Bosack v. Soward*, 586 F.3d 1096, 1104 (9th Cir. 2009)  
 9 (citing *Kyocera*, 341 F.3d at 994) (emphasis added). Fairly read, that is the entirety of what  
 10 VSA complains of here.

11 Under Section 10(a), a court may vacate an award only if it determines that:  
 12 (1) it was procured by corruption, fraud, or undue means; (2) there was evident partiality in  
 13 the arbitrator; (3) the arbitrator substantially prejudiced a party by his misconduct or by  
 14 refusing to postpone the hearing or refusing to hear evidence; and (4) "where the arbitrators  
 15 exceeded their powers, or so imperfectly executed them that a mutual, final, and definite  
 16 award upon the subject matter submitted was not made."

17 The only statutory grounds on which an arbitration award may be corrected or  
 18 modified under the FAA are found in 9 U.S.C. § 11, which provides that a court may correct  
 19 or modify an award if it determines: (a) there is an evident material miscalculation of figures  
 20 or an evident mistake in the description or a person or thing in the award; (b) "where the  
 21 arbitrators have awarded upon a matter not submitted to them, unless it is a matter not  
 22 affecting the merits of the decision upon the matter submitted"; or (c) the award is imperfect  
 23 in its form and not affecting the merits of the controversy.

24 Notwithstanding the Supreme Court's clear holding in *Hall Street* – that  
 25 vacatur of an award is restricted to the statutory grounds set out in the FAA – the Ninth  
 26 Circuit still applies very narrow non-statutory grounds for vacatur related to an arbitrator  
 27 "exceeding his powers" under Section 9 above. The Ninth Circuit recognizes that  
 28 "[a]rbitrators exceed their powers when they express a 'manifest disregard of law,' or when

1 they issue an award that is 'completely irrational.'" *Bosack*, 586 F.3d 1at 104 (citing cases).  
 2 But, under these standards, "[r]eview of an arbitration award is both limited and highly  
 3 **deferential**." *Comedy Club, Inc. v. Improv West Associates*, 553 F.3d 1277, 1288 (9th Cir.  
 4 2009) (emphasis added).<sup>13</sup> Additionally, manifest disregard of the facts is **not** a grounds for  
 5 vacatur. *Coutee v. Barrington Capital Group, LP*, 336 F.3d 1128, 1133 (9th Cir. 2003).

6 "Manifest disregard of the law' means something more than just an error in the  
 7 law or a failure on the part of the arbitrators to understand or apply the law. **It must be clear**  
 8 **from the record that the arbitrator recognized the applicable law and then ignored it.**"  
 9 *Michigan Mutual Insurance Co. v. Unigard Security Insurance Co.*, 44 F.3d 826, 832 (9th  
 10 Cir. 1995) (finding that the arbitrators did not manifestly disregard the law) (citations  
 11 omitted; emphasis added). The "manifest disregard exception requires something beyond  
 12 and different from a mere error in the law or failure on the part of the arbitrators to  
 13 understand and apply the law. . . . Accordingly, [a court] may not reverse an arbitration  
 14 award even in the face of an erroneous interpretation of the law." *Collins*, 505 F.3d at 879  
 15 (citations omitted). "Moreover, to rise to the level of manifest disregard the governing law  
 16 alleged to have been ignored by the arbitrators must be *well defined, explicit, and clearly*  
 17 *applicable*." *Id.* at 879-80 (citations omitted, emphasis in original). The manifest disregard  
 18 of law doctrine has been described as "**severely limited**" and a "**doctrine of last resort**."  
 19 *Wallace v. Buttar*, 378 F.3d 182, 189 (2nd Cir. 2004) ("arbitrator did not manifestly  
 20 disregard the law because there was a colorable justification for the arbitration award").

21 Similarly, the "completely irrational" standard is "extremely narrow and is  
 22 satisfied only 'where [the arbitration decision] fails to draw its essence from the agreement.'"  
 23

24 <sup>13</sup> The Second Circuit has also traditionally applied the manifest disregard exception.  
 25 However, rarity of overturning an arbitration award on that basis highlights the steep burden  
 26 VSA must prove to vacate the arbitrator's award in this matter. In *Duferco Int'l Steel*  
 27 *Trading v. T. Klaveness Shipping*, 333 F. 3d 383, 389 (2.d Cir. 2003) the court calculated  
 28 that between 1960 and 2003, the Second Circuit applied the manifest disregard of the law  
 standard 48 times. Only four of the 48 arbitral awards were vacated, *and* of those four,  
 three were arguably based on statutory grounds other than manifest disregard of the law,  
 meaning that in essence, the Second Circuit approved of the exception one time in 43 years.

1 *Comedy Club*, 553 F.3d at 1277 (finding that the arbitrator's award was not completely  
 2 irrational) (citing *Hoffam*, 553 F.3d at 461-62). "To consider whether an award drew its  
 3 essence from the ... agreement, the court must ensure that the arbitrator looked to the words  
 4 of the contract and to the conduct of the parties." *Michigan Mutual*, 44 F.3d at 831 (citation  
 5 omitted). Moreover, courts "may not set an award aside simply because [it] might have  
 6 interpreted the agreement differently . . . [r]ather the contract must not be 'susceptible of the  
 7 arbitrator's interpretation.'" *Hoffman*, 553 F.3d at 462; *see also Bosack*, 686 F.3d at 1106  
 8 ("the question is whether the award is 'irrational' with respect to the contract, not whether the  
 9 [arbitrator's] findings of fact are correct or internally consistent"). Under this inquiry, the  
 10 court only determines whether the arbitrator decided issues that were actually before him to  
 11 decide. *Michigan Mutual*, 44 F.3d at 831. In other words, the inquiry is whether the  
 12 arbitrator had the power to resolve the issues addressed in its award. *Id.*

13 In sum, the Federal Arbitration Act allows a federal court to  
 14 correct a technical error, to strike all or a portion of an award  
 15 pertaining to an issue not at all subject to arbitration, and to  
 16 vacate an award that evidences affirmative misconduct in the  
 17 arbitral process or the final result or that is completely  
 18 irrational or exhibits a manifest disregard for the law. These  
 grounds afford an **extremely limited review authority**, a  
 limitation that is designed to preserve due process but not to  
 permit unnecessary public intrusion into private arbitration  
 procedures.

19 *Kyocera*, 341 F.3d at 997-98 (emphasis added). Where there are no grounds for vacatur,  
 20 modification, or correction of an award, a court must confirm the Arbitration Award under  
 21 the FAA. 9 U.S.C. § 9; *Hall Street*, 552 U.S. at 582.

## 22 **V. THE ARBITRATOR DID NOT EXCEED HIS POWERS AND THE** 23 **ARBITRATION AWARD SHOULD NOT BE VACATED**

### 24 **A. There Are No Statutory Grounds for Vacatur of the Arbitration Award and the** 25 **Court is Precluded from Re-trying this Dispute.**

26 None of the statutory grounds under the CAA or the FAA for vacatur of an  
 27 Arbitration Award are met here. VSA does not argue there was fraud or corruption, or that  
 28 there was any bias or procedural improprieties that prejudiced its interests. Instead, VSA is

1 improperly asking the Court to review the merits of the case, by re-examining relevant legal  
 2 authorities and re-weighing the evidence. In short, says VSA, the Arbitrator "got it wrong."  
 3 That is just not enough.

4 As explained above, VSA's request is improper because courts cannot review  
 5 the merits of an underlying arbitration. Courts cannot review an arbitrator's factual findings  
 6 and legal conclusions. And courts are prohibited from overturning an arbitrator's award  
 7 because the court disagrees with the arbitrator's findings. *See e.g. Bosack*, 586 F.3d at 1104  
 8 (courts are "prohibited" from reviewing "factual findings and legal conclusions" even when  
 9 reviewing an arbitrator's decision for manifest disregard of the law).

10 VSA cannot deny it is improperly asking the court to weigh evidence – why  
 11 else would it have filed a stack of exhibits more than a foot tall? VSA is unhappy with the  
 12 outcome of the arbitration and it is now attempting to re-try the dispute on the merits before  
 13 this Court. VSA agreed to arbitrate its disputes, and now it must abide by the outcome of the  
 14 arbitration. "The arbitrator's decision should be the end, not the beginning, of the dispute."  
 15 *Moncharsh*, 3 Cal.4th at 10.

16 **B. The Arbitrator's Well-Reasoned Award Shows that the Arbitrator Did Not**  
 17 **Manifestly Disregard the Law.**

18 The only issue presented by VSA regarding the Arbitrator's alleged manifest  
 19 disregard of the law is whether or not the Arbitrator manifestly disregarded the **law** in his  
 20 determination that Defendants did not infringe VSA's copyrighted ValueSelling Program  
 21 workbook by not applying the "extrinsic/intrinsic" copyright test in this Circuit. The  
 22 Arbitrator's detailed and well-reasoned Interim Award shows that the Arbitrator did not  
 23 manifestly disregard the law, and in fact, even if he got it wrong (which he did not), that the  
 24 Arbitrator *did* apply the "extrinsic/intrinsic" test.

25 As framed by VSA in its pre-hearing brief,<sup>14</sup> and reiterated by the Arbitrator in  
 26

27 <sup>14</sup> And since it was submitted in VSA's pre-hearing brief, this issue should be conclusively  
 28 determined to be "within the arbitrator's powers" under either the CAA or FAA.

1 his Interim Award, one issue before the Arbitrator was whether Defendants improperly  
 2 infringed VSA's 1998 copyright of a ValueSelling Program workbook, which contains the  
 3 ValuePrompter form and the Qualified Prospect Formula. (VSA Exs. A-0046, pp. 61-63; A-  
 4 0225, p. 5.) VSA contends the Arbitrator manifestly disregarded the law because he  
 5 acknowledged the required analysis under the "extrinsic/intrinsic" test, as discussed in *Mattel*  
 6 *Inc. v. MGA Entertainment, Inc.*, 616 F.3d 904 (9th Cir. 2010), and then chose to deliberately  
 7 ignore it.

8           The two-part "extrinsic/intrinsic" test is used by courts in this Circuit to  
 9 determine the similarity between two works in determining whether a copyrighted work is  
 10 infringed. The "extrinsic/intrinsic" test is used to determine whether the infringing work is  
 11 similar in expression and ideas. *See, e.g., Mattel*, 616 F.3d at 913-14. First, a court  
 12 undergoes the extrinsic test, "examining the similarities between the copyrighted and  
 13 challenged works and then determine[s] whether the similar elements are protectable or  
 14 unprotectable." *Id.* (emphasis added). After the unprotectable elements are filtered out, what  
 15 is left is the author's protectable expression of an idea. The extrinsic test is used to determine  
 16 whether the intrinsic test is applied using the "substantial similarity" analysis or the "virtually  
 17 identical" analysis. *Id.* The "virtually identical" analysis is used for "thin copyrights," where  
 18 there is only a narrow range of possible expression. Second, the court undergoes the  
 19 intrinsic test, asking whether a reasonable person would find the challenged work either  
 20 "substantially similar" or "virtually identical" as to the protectable portions of the  
 21 copyrighted work. *Id.*

22           VSA presents no evidence, by way of declaration or otherwise, which supports  
 23 its claim that the Arbitrator acknowledged the "extrinsic/intrinsic" test, then deliberately  
 24 chose to ignore it. Indeed, analysis of the Arbitrator's Interim Award shows that **the**  
 25 **Arbitrator did apply the "extrinsic/intrinsic" test**. The Arbitrator found and held as  
 26 follows:

- 27           1.       The issue was whether Defendants infringed VSA's 1998 copyrighted
- 28                   ValueSelling Program training manual. (VSA Ex. A-0225, p. 229.)

- 1           2.     In order to prevail on its claim, VSA had to prove it had a valid copyright and  
2                 that the alleged copied elements were original. Copying is proved by showing  
3                 Defendants had access to the copyrighted material and that the infringing work  
4                 is "substantially similar in both expression and ideas" to the copyrighted work.  
5                 (*Id.*)
- 6           3.     Since it was undisputed that VSA had a copyright and Defendants had access  
7                 to the copyrighted work, the issue was whether the challenged work is  
8                 "substantially similar" or "virtually identical" to the copyrighted work. (*Id.* at  
9                 p. 230.)
- 10          4.     The Arbitrator engaged in the extrinsic portion of the test, comparing the 1998  
11                 copyrighted workbook to ESG's alleged infringing work. The Arbitrator stated  
12                 "I find that some of the constituent parts are similar (*e.g.* the [Qualified  
13                 Prospect Formula], [the ValuePrompter] graphic and case study materials), but  
14                 the general organization, structure, sequence and language are different." (*Id.*  
15                 at p. 232.)
- 16          5.     As to those items that were similar – the ValuePrompter and the Qualified  
17                 Prospect Formula – the Arbitrator either filtered them out as unprotectable, or,  
18                 in other words, took the next step and applied the legal intrinsic test.<sup>15</sup> The  
19                 Arbitrator held as follows:  
20                 a.     The ValuePrompter and Defendants' eNavigator "are not 'virtually  
21                         identical' or even 'substantially similar,' as those terms are used in  
22                         copyright law." (*Id.* at p. 234). The Arbitrator alternatively held that  
23                         the ValuePrompter is not even copyrightable in and of itself because it  
24  
25

26 <sup>15</sup> As to the "case study material" that the Arbitrator found was similar, the Arbitrator held that  
27 VSA did not own the copyrights to the material it had incorporated into its workbooks, and  
28 thus it had no standing to sue for copyright infringement of them. (VSA Ex. A-0225, pp.  
236-38.) Therefore, there was no need for the Arbitrator to engage in any infringement test.

1 is a "blank form" under relevant copyright law. (*Id.*)<sup>16</sup> In other words,  
 2 even if Defendants' eNavigator was substantially similar or virtually  
 3 identical to the ValuePrompter, it would be irrelevant because the  
 4 ValuePrompter is first filtered out as unprotectable (and therefore, there  
 5 would be no reason to reach the intrinsic test).

6 b. The Qualified Prospect Formula is not copyright-protectable. (*Id.* at pp.  
 7 234-35.) Therefore, it is filtered out at the extrinsic stage and there is no  
 8 need to engage in the intrinsic portion of the test.

9 Contrary to VSA's contention, the Arbitrator did not act in manifest disregard  
 10 of the law. Just because the Arbitrator did not specifically cite to *Mattel*, or place in bold  
 11 print, "**I am doing the extrinsic/intrinsic test!**" does not mean the Arbitrator manifestly  
 12 disregarded the law, let alone did not follow the law. Indeed, the Arbitrator actually applied  
 13 the "extrinsic/intrinsic" test demanded by VSA.

14 An award "should be enforced, despite a court's disagreement with it on the  
 15 merits, if there is a **barely colorable justification** for the outcome reached." *Wallace*, 378  
 16 F.3d at 190 (emphasis in original). There can be no argument that there is a "barely  
 17 colorable justification" for the outcome reached by the Arbitrator. The Arbitrator reviewed  
 18 and weighed the significant evidence in the arbitration, applied the "extrinsic/intrinsic" test  
 19 which VSA claims is applicable, and explained his reasoning in his Interim Award.<sup>17</sup> VSA  
 20 cannot seek a *de novo* review of the reasoning and the application of the law and fact in the  
 21 Arbitrator's Award. For the foregoing reasons, VSA's request to vacate the Arbitration

22 <sup>16</sup> VSA takes issue with the Arbitrator's reliance on the case of *Advanz Behavioral*  
 23 *Management Resources, Inc. v. Mariflor*, 21 F.Supp.2d 1179 (C.D. Cal. 1998) and his  
 24 analysis of the ValuePrompter as a "blank form" under that case and related cases. The  
 Arbitrator's decision in this regard is unassailable, but even if wrong, would be nothing  
 more than an error of law, which is not a basis to overturn an arbitration award.

25 <sup>17</sup> Arbitrators are not required to issue reasoned awards, and they are allowed to make awards  
 26 without "explanation of their reasons and without a complete record of their proceeding."  
 27 *Bosack*, 586 F.3d at 1104. Despite this fact, here, the Arbitrator made a completely  
 28 reasonable and comprehensive explanation of his Award justified by his interpretation of  
 both the relevant facts and the evidence presented at the arbitration hearing. VSA just does  
 not like the outcome.

1 Award should be denied.

2 **C. The Arbitrator's Award Is Not Completely Irrational.**

3 VSA argues, as another basis for vacatur of the Arbitration Award, that the  
4 Arbitrator's Award is "completely irrational" because it does not "draw its essence" from the  
5 Settlement Agreement. VSA makes the tortured argument that the Arbitrator was only  
6 allowed to decide whether Defendants infringed VSA's copyrighted workbook, but not  
7 allowed to decide whether the very portions of that workbook which VSA contended were  
8 copied – including the ValuePrompter and the Qualified Prospect Formula – were  
9 protectable. That finding, argues VSA, is completely irrational.

10 It is not the Arbitrator's finding that is completely irrational in this case.  
11 Instead, it is VSA's logic that is completely irrational and lacking any basis. The Settlement  
12 Agreement (as well as the other agreements between the parties) contains a broad arbitration  
13 provision, granting the Arbitrator the power to adjudicate "*any* dispute, controversy, or  
14 question arising under, out of or relating to this Agreement or breach thereof for which the  
15 moving party seeks money damages." (VSA Ex. B-0339, p. 342, ¶ 12.) VSA sued  
16 Defendants for copyright infringement of its ValueSelling Program workbook, arguing that  
17 Defendants copied its ValuePrompter by creating the eNavigator, and VSA's Qualified  
18 Prospect Formula by creating the Prospect to Customer Formula, and sought money damages  
19 (as well as other relief). (VSA Federal Complaint (Doc. No. 1); VSA Ex. A-0036, pp. 38-39,  
20 43; VSA Ex. A-0046, pp. 61-63; VSA Ex. A-0120, pp. 125-26, 128, 132-33.) By the very  
21 nature of its claim, VSA invited the Arbitrator to decide whether the ValuePrompter and the  
22 Qualified Prospect Formula were copyright-protected because if they were part of a  
23 copyright-protected work and not protectable, then the similarities between them and  
24 Defendants' corresponding works would be meaningless.

25 Indeed, the Arbitrator decided that issue because he applied the  
26 "extrinsic/intrinsic" test as VSA insisted that he do. As explained above, and by VSA in its  
27 own brief, the extrinsic portion of the test asks the arbitrator to compare the challenged work  
28 to the copyrighted work in order to assess the similarities and filter out the unprotectable

1 portions of the work. *Mattel*, 616 F.3d at 913-14. As VSA had specifically argued, the  
 2 Arbitrator found that the similarities between VSA's copyrighted work and ESG's workbook  
 3 to be the ValuePrompter and the eNavigator, and the Qualified Prospect Formula and the  
 4 Prospect to Customer Formula. But, in applying the law, the Arbitrator filtered out the  
 5 ValuePrompter and the Qualified Prospect Formula from VSA's copyrighted material  
 6 because he found that they are not protectable, and therefore, it is irrelevant whether the  
 7 eNavigator and the Prospect to Customer Formula are substantially similar or virtually  
 8 identical. The Arbitrator's finding was inherent in his application of the "extrinsic/intrinsic"  
 9 test, and therefore it is drawn from the essence of the parties' dispute **as framed by VSA and**  
 10 **initiated under the Settlement Agreement by VSA.**

11 VSA cannot alone be heard to complain that this decision of the Arbitrator  
 12 came as any surprise to it. In *Michigan Mutual*, the losing defendant to an arbitration sought  
 13 vacatur of an arbitration award on grounds that it was completely irrational because it was  
 14 not drawn from the essence of the contract. 44 F.3d at 830. The defendant argued that the  
 15 arbitrator's award, which imposed conditions precedent on defendant's reimbursement under  
 16 the contract, should be vacated because the contract made no mention of such conditions,  
 17 and therefore, the award was not "drawn in essence" from the contract. *Id.* Finding against  
 18 the defendant, the Ninth Circuit stated that the contract gave the "arbitration panel broad  
 19 powers to fashion relief for issues submitted to it" because the contract stated that "any"  
 20 dispute was to be arbitrated, and it contained no limitation on the kinds of relief the  
 21 arbitration panel could award. *Id.* at 831. Where the contract does not limit an arbitrator's  
 22 power to fashion an award, an arbitrator is "'empowered to grant any relief reasonably fitting  
 23 . . . .'" *Id.*

24 Even though the parties did not explicitly ask the arbitration panel to decide the  
 25 issue of reimbursement, that issue "necessarily arose" out of the arbitrator's decision and "the  
 26 parties must have been aware that an award" would include conditions of reimbursement. *Id.*  
 27 at 830. Therefore, the *Michigan Mutual* court said that because the arbitration panel was  
 28 "implicitly empowered" by the contract to formulate an appropriate award which included

1 issues of reimbursement, the award drew its essence of the contract. *Id.* at 831.

2 As explained above, the same is true here. VSA implicitly invited the  
3 Arbitrator to assess whether the ValuePrompter and the Qualified Prospect Formula were  
4 copyright-protectable portions of its workbooks. VSA claims that Defendants copied those  
5 portions of its workbooks. Therefore, VSA must have known that the Arbitrator would  
6 assess whether those portions were copyrightable under the applicable legal test.

7 The "completely irrational" basis for vacatur is "extremely" narrowly  
8 construed. *Comedy Club*, 553 F.3d at 1277. So long as the Award is not "completely  
9 irrational" when compared to the contract, the Court cannot vacate the Arbitrator's Award,  
10 even if the Court finds that the Arbitrator's findings are incorrect. *Bosack*, 686 F.3d at 1106.  
11 Therefore, VSA's request that the Arbitrator's Award be vacated because it is "completely  
12 irrational" should be denied.

## 13 VI. THERE ARE NO GROUNDS TO MODIFY OR 14 CORRECT THE ARBITRATION AWARD

15 As an alternative, VSA requests that the Court correct or modify the  
16 Arbitrator's Award by eliminating the Arbitrator's finding that the ValuePrompter and the  
17 Qualified Prospect Formula are not copyright-protected. VSA's argument is that the Court  
18 can sever that portion of the Award pursuant to 9 U.S.C § 11(b), which allows correction or  
19 modification of an award "where the arbitrators have awarded upon a matter not submitted to  
20 them."<sup>18</sup> VSA's request fails for two reasons.

21 First, VSA fails to satisfy the statutory ground for modification because the  
22 Arbitrator did not make an Award upon a matter not submitted to him. For the same reasons  
23

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24 <sup>18</sup> VSA does not make an argument for correction under the CAA. Presumably, VSA would  
25 make the same arguments it makes under the FAA, pursuant to California Code of Civil  
26 Procedure § 1286.6(b), which allows for correction where "[t]he arbitrators exceeded their  
27 powers but the award may corrected without affecting the merits of the decision upon the  
28 controversy submitted." Here, VSA fails to prove the arbitrator exceeded his powers under  
the CAA and/or the FAA, therefore it cannot seek correction of the award under the CAA.  
Moreover, VSA is precluded from seeking correction for the same reasons it is precluded  
under the FAA as articulated above.

1 articulated above that the Arbitrator did not manifestly disregard the law, and was not  
2 completely irrational in his Award, VSA fails to show that the Arbitrator's finding that the  
3 ValuePrompter and the Qualified Prospect Formula are not copyrightable was not submitted  
4 for his review.

5           Second, this is simply an attempt by VSA to get through the back door what it  
6 cannot get through the front door. Virtually the entirety of VSA's case against Defendants  
7 was based upon a claim of similarities in copyrighted workbook materials constituting the  
8 ValuePrompter and the Qualified Prospect Formula. To reverse the Arbitrator's findings on  
9 this key point on the merits despite the submission of that dispute to him would completely  
10 undermine the merits of the Arbitrator's Award and the public policy and law supporting  
11 finality of arbitration awards. If the Court overturns the Arbitrator's ruling regarding the  
12 copyrightability of the ValuePrompter and the Qualified Prospect Formula, then VSA will be  
13 free to sue Defendants every time Defendants use or slightly modify their eNavigator or  
14 Prospect to Customer Formula, under the pretense that the new use or slight change  
15 somehow makes them subject to a new claim for copyright infringement. Indeed, VSA  
16 essentially wants this Court to change the Arbitration Award to provide that Defendants (and  
17 presumably others) cannot use its ValuePrompter or Qualified Prospect Formula. But that is  
18 not what the Award provides, and VSA has no right to obtain that kind of declaratory relief  
19 from this Court. The Award provides only that the ValuePrompter and the Qualified  
20 Prospect Formula are not copyright-protectable, and that Defendants did not commit  
21 copyright infringement in using an admittedly similar form and formula for their business. If  
22 VSA did not want this issue decided by a trier of fact, it should not have submitted this issue  
23 to arbitration.

24           The Arbitrator recognized that if he did not fashion the Award in the manner  
25 he did, VSA's ongoing and numerous disputes with Defendants would not end. In order to  
26 end these disputes once and for all, the Court must deny VSA's motion to correct or modify  
27 the Arbitral Award.

28

**VII. DEFENDANTS' CROSS-PETITION SHOULD BE CONFIRMED  
AND DEFENDANTS SHOULD BE AWARDED THEIR  
ATTORNEYS' FEES AND COSTS IN OPPOSING THIS MOTION**

Because VSA has failed to prove any statutory grounds for vacatur, modification, or correction under either the CAA or FAA, and because the Arbitrator did not act in manifest disregard of the law or fashion a completely irrational award, this Court must deny this motion and affirm Defendants' Cross-Petition, issuing a judgment on the Award in favor of Defendants and against VSA. Cal. Code Civ. Pro. § 1286; 9 U.S.C. § 9.

For the reasons stated in Defendants' Cross-Petition, Defendants also seek their attorneys' fees and costs incurred in opposing this motion based on the attorneys' fees provisions in the parties' Agreements.

Accordingly, a judgment should be entered by this Court confirming the arbitration Award in its entirety and awarding attorneys' fees and costs in the sum of \$38,978.63 with regard to this motion, for a total judgment amount of \$301,113.65, plus pre- and post-judgment interest.

**VIII. CONCLUSION**

There are no statutory grounds for vacatur, modification, or correction of the Arbitral Award under the CAA or the FAA. Neither are there grounds to vacate the Award based on the Arbitrator's alleged manifest disregard of the law or alleged completely irrational award. To the contrary, as explained herein, the Arbitrator properly and thoughtfully applied the legal test requested by VSA and decided all issues submitted to him for review. Likewise, there are no grounds to modify or correct the Award by eliminating the Arbitrator's finding that VSA's ValuePrompter and Qualified Prospect Formula are not protected by copyright, because that issue was inherently submitted to the Arbitrator for review, and to hold otherwise would completely and negatively affect (and in fact in many ways reverse) the outcome of the controversy and allow VSA to continue to allege copyright infringement against Defendants.

1 VSA agreed to arbitrate its disputes and it must live with the consequences.  
2 The parties to this case selected a fair, unbiased and excellent arbitrator, litigated this dispute  
3 for a year, conducted voluminous discovery, took depositions, drafted multiple briefs, and  
4 spent 10 days presenting their cases to the Arbitrator. No "due process" was lacking.  
5 Indeed, at the end of the hearing, the Arbitrator asked each side if they felt they had received  
6 a fair hearing. VSA said it had. That was a true statement.

7 The Court should not allow this dispute to drag on any longer. Courts do not  
8 overturn arbitral awards lightly, and this should be no exception. For the foregoing reasons,  
9 Defendants respectfully request that the Court deny VSA's Motion and instead grant their  
10 Cross-Petition to Confirm the Arbitration Award, entering Judgment in the form lodged  
11 concurrently herewith.

12 Dated: May 9, 2011

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

13 By

s/ Robert S. Gerber

14 ROBERT S. GERBER

15 Attorneys for Cross-Petitioners and Defendants  
16 KEVIN TEMPLE, and THE ENTERPRISE  
17 SELLING GROUP, LLC

E-mail: [rgerber@sheppardmullin.com](mailto:rgerber@sheppardmullin.com)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on May 9, 2011 to all counsel who are deemed to have consented to electronic service via the Court's CM/ECF system per Civil Local Rule 5.4. Any other counsel of record will be served by electronic mail, facsimile and/or overnight delivery.

*s/ Robert S. Gerber*

ROBERT S. GERBER (SBN 137961)

E-mail: rgerber@sheppardmullin.com